MICHIGAN PROBATE JUDGES ASSOCIATION
COMMENTS ON ADM 2005-37

The rules changes proposed in ADM 2005-37 were developed in response to the release of the Auditor General's report in October, 2003. These rules were a joint submission of the Michigan Probate Judges Association (MPJA) and the Probate and Estate Planning Council of the State Bar of Michigan (PEPC). They were submitted to the Supreme Court in September, 2005. Having had considerable time for reflection, it appears that some of the rules have flaws that would not serve the best interests of the public we serve. Specifically, we recommend that the rule changes as related to MCR 5.101, MCR 5.125(B)(1) and (5), and MCR 5.410 either be referred back to MPJA and PEPC or be modified as suggested in these comments.

Items in **bold** and ~~strikeout~~ are modifications to the present court rules jointly agreed to by the Probate and Estate Planning Council and the Michigan Probate Judges Association and submitted to the Supreme Court in September 2005.

Items in **BOLD CAPITAL** and ~~**BOLD DOUBLE STRIKEOUT**~~ are modifications made by the Supreme Court.

MCR 5.101 Form and Commencement of Action

(A) Form of Action. There are two forms of action, a "proceeding" and a "civil action."

(B) Commencement of Proceeding. A proceeding is commenced by filing an application or a petition with the court.

(C) Civil Actions, Commencement, Governing Rules. The following actions, must be titled civil actions, **MUST BE** commenced by filing a complaint, and **ARE** governed by the rules which are applicable to civil actions in circuit court:

(1) Any action against a **nonfiduciary** ~~another~~ filed by a fiduciary, and

(2) Any action filed by a claimant after notice that the claim has been disallowed.

Comments

The rules change was proposed to try to reduce confusion over what other actions, besides actions on claims, had to be brought in the form of a civil action. The word "nonfiduciary" was proposed to eliminate any confusion as to whether a surcharge action against a former fiduciary could be brought by petition. Since the probate court already has jurisdiction over a suspended fiduciary it did not seem necessary to require a summons to gain jurisdiction over the fiduciary.

Under the Estates and Protected Individuals Code (EPIC) the only action that must be brought as a civil action is one where a claimant has received notice that their claim has been disallowed. A better way to handle this rule would be to modify MCR 5.101(C) to read: "Any action filed by a claimant after notice that the claim has been disallowed must be commenced by filing a complaint and is governed by the rules which are applicable to civil actions in circuit court." Subsections (1) and (2) could be deleted.

MCR 5.125(B)(1) – Interested Persons – Special Conditions for Interested Persons

(1) Claimant. **Only a claimant who has properly presented a claim PURSUANT TO MCR 5.306(D) and whose claim has not been disallowed and remains unpaid** ~~files a claim with the court, with a personal representative, or with a trustee of a trust required to give notice to creditors pursuant to MCL 700.7504, and whose claim remains undetermined or~~ need be notified of specific proceedings under subrule (C).

Comments

While the change suggested by the Supreme Court appears minor, it could be interpreted as attempting to exclude EPIC claim requirements as prerequisites that must also be complied with in order to file a valid claim. We would recommend that the language added by the Supreme Court not be added in order to avoid creating confusion.

MCR 5.125(B)(5) – Interested Persons – Special Conditions for Interested Persons

(5) Decedent as Interested Person. If a decedent is an interested person, the personal representative of the

decedent's estate is the interested person. If there is no personal representative, the interested persons are ~~those persons who would be interested persons in the commencement of proceedings for the estate of the deceased interested person.~~ THE KNOWN HEIRS OF THE ESTATE OF THE DECEDENT, THE KNOWN DEVISEES, AND THE ATTORNEY GENERAL.

Comments

The proposed additional language to require notice to the Attorney General is unnecessary. Generally, notice to the Attorney General is only given if there are no known heirs or for certain charitable trusts. It is not clear what the Attorney General could or would do in these matters. The rule would create more paper for the Attorney General's office to sift through in order to find meaningful material. We would recommend deleting the requirement of notice to the Attorney General unless the Attorney General desires to receive these notices. In the alternative, we would suggest adding the language "…if there are no known heirs." at the end of the last sentence.

MCR 5.410(A) – Guardian Ad Litem - Appointment

(A) Appointment. A guardian ad litem shall be appointed in every adult conservatorship with unrestricted assets for the purposes of any hearing held unless the protected individual is represented by his or her own attorney or is mentally competent but aged or physically infirm. A guardian ad litem may be appointed in further proceedings as ordered by the court. A guardian ad litem may be ordered to continue to represent the protected individual during the period of the conservatorship.

Comments

While this rule was agreed to by the MPJA & PEPC, it is clear, on reflection, that it is overly broad and will create unnecessary expense for the estates of the people we are trying to protect. The unnecessary expense will be further compounded if the duties described in MCR 5.410(B) as described below are also approved. Currently, EPIC only requires that a guardian ad litem (GAL) be appointed for the hearing on the petition for the appointment of a conservator or another protective order. This rule would require the court to appoint a guardian ad litem for *any* hearing. Currently,

courts waive the appointment of a GAL for many types of hearings where the court concludes that an appointment is not necessary. In fact, the Code of Judicial Conduct specifically provides that judges "…should not cause unnecessary expense by making unnecessary appointments." Code of Judicial Conduct, Cannon 3(B)(4). For example, courts often waive the appointment of a GAL for accounts where the only asset is veteran's benefits because the Veteran's Administration conducts its own review. In fact, MCL 35.79 expressly forbids appointing a guardian ad litem on an accounting by a guardian for a veteran except upon motion by an interested party and for good cause shown. Sometimes the issue presented does not require the appointment. Sometimes the size of the estate does not justify appointing a GAL. If the ward is deceased, many courts do not require a GAL to review the final account. If the expenses are minimal, the appointment of a GAL may also be waived. Other examples of waiving the appointment of a GAL for lack of necessity are too myriad to mention. While the rule is useful to explicitly permit the court to order a GAL to continue to represent a protected individual during the entire period of the conservatorship, it is not helpful to the protected individual that a GAL be appointed for every hearing when it is not necessary.

However, if the words "involving a determination of the capacity of the protected individual" were added after the words "any hearing" the court rule would be consistent with the statute, preserve flexibility and avoid unnecessary expense to estates.

We would recommend that either the language be modified as suggested or the rule be sent back to MPJA and PEPC for further development.

(B) Duties. The duties of a guardian ad litem include but are not limited to the following:

(1) A guardian ad litem shall represent the interest of the protected individual at all times.

(2) A guardian ad litem shall review the inventory and accountings of a conservator for accuracy and appropriateness.

(3) A guardian ad litem shall require documentation from a conservator for income and disbursements for any questionable items on the inventory or accounting.

(4) A guardian ad litem shall report to the court or file an objection with the court if the inventory or accounting is not proper.

(5) A guardian ad litem shall determine if a conservator is properly preserving any estate plan of the protected individual.

(6) A guardian ad litem shall perform such other duties as may be required by statute, court rule or as may be required to protect the interest of the protected individual.

Comments

These duties, if required by every GAL for *every* appointment, would result in unnecessary work and expense for these estates. While each of these proposed duties may be appropriate from time to time, depending on the nature of the appointment, to require that all be performed for *every* assignment when not related to the issue necessitating the assignment is a waste of estate assets.

This court rule presents an opportunity for excessive GAL fees for services that are either unnecessary or duplicative. Subsections (2), (3), (4), (5), and (6) are the most problematic. Subsection (2) could be construed to require the appointment of a GAL when an inventory is filed. It could also be construed to require the review of accountings that have previously been approved by the court. It is not necessary to review previously approved accounts for accuracy and appropriateness. While a GAL may sometimes find it helpful to review a prior account in order to make a recommendation on a current account, it is generally unnecessary and wasteful to review prior accounts for accuracy and appropriateness. It is even more wasteful to require that this duty be carried out when the matter before the court has nothing to do with the inventory or accountings, such as sale of real estate. Subsection (3) would be appropriate, so long as the request for documentation is limited to the particular assignment. As written, subsection (3) is not clear. Subsection (4) is also not limited to the scope of the assignment and needs to be rewritten.

The duties in subsection (5) do not need to be performed for every GAL assignment. If the assignment does not relate to estate planning issues, why have an assessment of the estate plan? Certainly, if the assignment relates to an issue that may impact an estate plan, the GAL should make a

recommendation that addresses the issue. As written, subsection (5) exposes estates to excessive, unnecessary expense.

Subsection (6) is also overbroad. Rather than an open ended assignment to do anything "as may be required" to protect the interest of the protected individual, it would be better to strike the words "statute, court rule or as may be required", and replace that phrase with "the court". This would accomplish the same goal, without giving the GAL a blank check.

While MCR 5.410(A) can be fixed fairly easily, the duties described in MCR 5.410(B) require further review. The duties need to be limited to the task given to the GAL. We would respectfully suggest that section (B) be referred back to MPJA and PEPC. In the alternative, subsection (1), and (6) as modified could be adopted while referring the other subsections back to MPJA and PEPC. A second alternative would be to add the words "…are as enumerated by the court and may…" in section (B) after guardian ad litem.

All of these duties are appropriate from time to time, but, it is unnecessary and wasteful to require them all of the time in each and every single case.